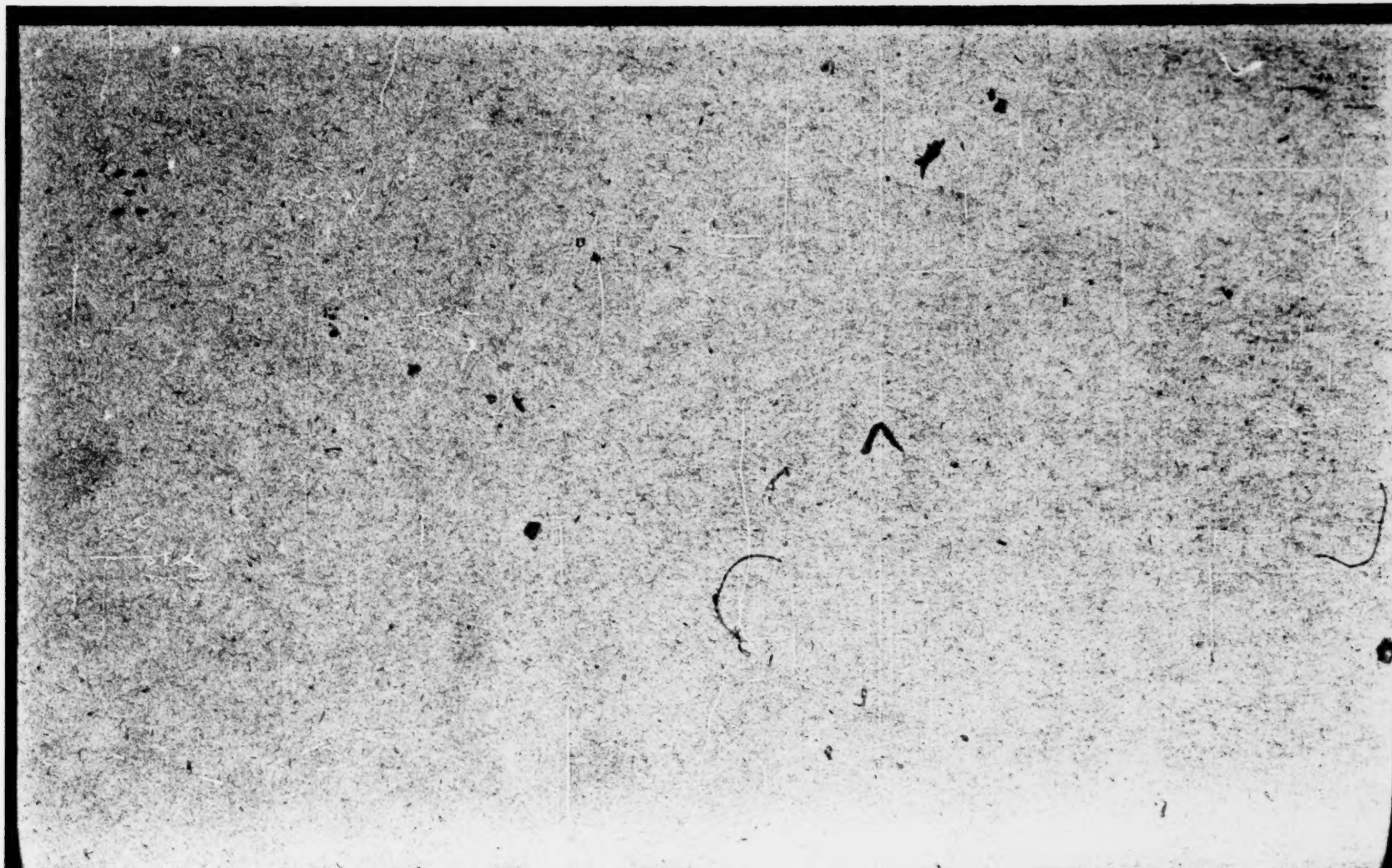

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Supreme Court of the United States

October Term, 1934.

No. 499

GREAT NORTHERN RAILWAY COMPANY,

Petitioner,

v.

P. B. SULLIVAN, doing business as ALBERTA COAL SALES COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

R. J. HAGMAN,
J. P. PLUNKETT,
Counsel for Petitioner.

Review Publishing Co., 141 E. Fifth St., St. Paul, Minn.

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Supreme Court of the United States

October Term, 1934.

No. ———

GREAT NORTHERN RAILWAY COMPANY,

Petitioner,

v.

P. B. SULLIVAN, doing business as ALBERTA COAL SALES COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

May It Please the Court:

The petition of the Great Northern Railway Company respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This proceeding involves the question of what is the correct measure of damages to be applied in the case of a shipment from a point in Canada to a point in the United States where the Interstate Commerce Commission has found that one factor of the through rate, viz., the proportional rate applicable from the international boundary to the destination in the United States was unjust and unreasonable. The precise question is: Where the Interstate Commerce Commission has

found that a proportional rate applicable from the international boundary to the destination in the United States was unjust and unreasonable but has made no finding with respect to the reasonableness of the through rate from the origin in Canada to the destination in the United States was the Commission correct in awarding damages to the shipper by way of reparation measured by the difference between such proportional rate and the maximum proportional rate found by the Commission to be just and reasonable?

The respondent, engaged in wholesaling coal, brought an action in the District Court of the United States for the District of Minnesota against the petitioner, Great Northern Railway Company, to recover the sum of $3,990.20 awarded by the Interstate Commerce Commission as reparation on numerous carload shipments of coal from points of origin in the Province of Alberta, Canada, to destinations in the State of North Dakota. These shipments moved under through bills of lading executed at the Alberta points of origin covering the movement to the destinations in North Dakota. The freight charges collected by the petitioner at the several destinations were computed by the use of through rates made up of two factors, one a so-called proportional rate from the point of origin in Alberta to the international boundary applicable only on coal destined to points south of the boundary, the other a proportional rate from the international boundary to the destination in North Dakota applicable only on coal originating north of the boundary. The petitioner paid over to its connecting carriers operating north of the boundary that portion of the freight charges applicable to that portion of the haul (Rec. 20).

In the proceeding before the Interstate Commerce Commission the respondent alleged only that the proportional rates

applicable from the international boundary to the destinations in North Dakota were unjust and unreasonable. No complaint was made respecting the proportional rates from the origins in Alberta to the international boundary nor the through rates from the origins in Alberta to the destinations in North Dakota that resulted from the combination of these proportional rates (Rec. 24-28). The Commission in its report (142 I. C. C. 543) found, with Commissioners Brainerd, Woodlock, Porter and Taylor dissenting, that the proportional rates from the international boundary to the destinations in North Dakota were unreasonable to the extent that they exceeded a scale of rates set forth in the decision, and awarded reparation measured by the difference between such proportional rates charged and those set forth in said scale. The Commission made no finding with respect to the reasonableness of the proportional rates from the origins in Alberta to the international boundary nor of the resulting through rates from such origins to the North Dakota destinations (Rec. 28-36).

At the trial in the District Court a jury was waived (Rec. 9) and the case was submitted on a stipulation of facts (Rec. 18). The District Court entered judgment in favor of the respondent for the amount of the reparation awarded by the Commission with interest (Rec. 10-14).

In *News Syndicate Co. v. New York Central R. R. Co.*, 275 U. S. 179, where the facts were very much the same, the Supreme Court said:

> "Had the through rate been just and reasonable no damages would have resulted to the plaintiff in error."

This was called to the attention of the trial court which said:

> "So that we have a service from the border down, over which the Commission possesses authority to determine

the reasonableness of the rates therefor, and that is what was done in this case; and while the Supreme Court in News Syndicate vs. New York Central, 275 U. S. 179, uses the language, 'had the through rate been just and reasonable, no damages would have resulted to plaintiff in error', it does not seem to me to be in conflict with the finding here, because in that case the defendant had failed to publish charges from point of origin to the international boundary and from the boundary point to destination. There might be no way to determine as to a violation of the Act except by determining the reasonableness of the through charge. The News Syndicate case also states with reference to the application of Section 16:

'And it was the duty of the Commission to ascertain the damages sustained. It is obvious that in the ascertainment of damages, the Commission had jurisdiction to determine the reasonableness of the charges exacted.'

I am of the opinion that the duty existed on the part of the carrier to have its proportional rate from the border to destination just and reasonable, and if they failed so to do the one aggrieved could avail himself of the remedies provided by the Act. In my judgment the Commission had full authority to determine the reasonableness of the rate from the border to destination. Such a rate must of necessity under the law be published. It constituted a tariff charge which the Commission has found to be unreasonable and for which wrong, it has, as I see it, properly awarded reparation, there being a sufficient basis for such an award and a proper foundation existing for the maintenance of the proceedings herein." (Rec. 12-13.)

Upon appeal the judgment was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit which did not discuss the statement quoted from the *News Syndicate case* but held that the Commission had considered the rates attacked not as independent rates from the international boundary to the North Dakota destinations but as part of the inter-

national through rates from the points of origin to the points of destination; that the petitioner committed a tort because it collected the unjust and unreasonable proportional rate; and consequently respondent's damages were properly measured by the difference between the proportional rates charged and those found reasonable by the Commission (Rec. 42-45).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals has adopted a measure of damages in this case which is inconsistent with previous decisions of the Supreme Court. In *L. & N. R. R. v. Sloss-Sheffield Co.*, 269 U. S. 217, the Supreme Court held that the measure of damages for excessive freight charges under Section 1 of the Act to Regulate Commerce was the amount of the excess exacted. The Circuit Court of Appeals has extended this rule so as to apply it in a case where only one element or factor of a through rate is found unreasonable and has adopted as the measure of damages in such a case the excess of such factor over a reasonable factor, notwithstanding the fact that the Supreme Court has said in at least three cases that a through rate may be reasonable although one or more of the factors of which it is composed be unreasonable. *U. S. v. Abilene & Southern Ry. Co.*, 265 U. S. 274; *L. & N. R. R. v. Sloss-Sheffield Co., supra*, and *News Syndicate Co. v. New York Central R. R., supra.*

2. This precise question has never been determined by the Supreme Court. It is important to all railroads and shippers in the United States and does not involve merely the small sum sued for in this proceeding. Nor is it confined to international shipments but may arise in connection with any shipment, national or international, moving on through rates composed

of combinations of local or proportional rates. Other similar cases are pending before the courts the disposition of which will be governed by the case at bar.* The question arises constantly in cases before the Interstate Commerce Commission. We believe that it is an important question of Federal law affecting the Commission's administration of the Interstate Commerce Act and the rights of interstate shippers and carriers generally.

3. At the conclusion of the case your petitioner moved the trial court for judgment in favor of the defendant on the ground that there was no substantial evidence of record to support any other conclusion than that defendant was entitled to judgment (Rec. 23). This motion was denied (Rec. 10-11). The Circuit Court of Appeals failed to correct this error (Rec. 12-15).

WHEREFORE, Your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this court for its review and determination

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*P. B. Sullivan v. Great Northern Ry. Co., and Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.

P. B. Sullivan v. Northern Pacific Ry. Co.

P. B. Sullivan v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.

P. B. Sullivan v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. and Northern Pacific Ry. Co.

P. B. Sullivan v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. and Farmers Grain & Shipping Co.

P. B. Sullivan v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. and Midland Continental R. R. Co.

Piper-Howe Lumber Co. v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.

Monarch Elevator Co. v. Northern Pacific Ry. Co.

Monarch Elevator Co. v. Great Northern Ry. Co.

on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its Docket No. 9871, Great Northern Railway Company, Appellant, vs. P. B. Sullivan, Doing Business as Alberta Coal Sales Company, Appellee, and that said decree of the Circuit Court of Appeals of the United States for the Eighth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

GREAT NORTHERN RAILWAY COMPANY,
By R. J. HAGMAN,
J. P. PLUNKETT,
Counsel for Petitioner.

Supreme Court of the United States

October Term, 1934.

GREAT NORTHERN RAILWAY COMPANY,

Petitioner,

v.

P. B. SULLIVAN, doing business as ALBERTA COAL SALES COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the District Court of the United States for the District of Minnesota, Third Division, has not been officially reported but it found at page 11 of the Record.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit dated September 4, 1934, has not been officially reported to this date but is found on pages 42 to 45 of the Record.

II.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered on September 5, 1934 (Rec. p. 45), less than three months prior to the date of application for this writ of certiorari (U. S. Code, Title 28, Sec. 350).

The jurisdiction of the Supreme Court is invoked under paragraph (a) of Section 240 of the Judicial Code, as amended and re-enacted by the Act of February 13, 1925 (U. S. Code, Title 28, Sec. 347).

III.

STATEMENT OF THE CASE.

A statement of the case has been given in the petition under the heading "Summary Statement of the Matter Involved."

IV.

SPECIFICATIONS OF ERROR.

1. The Circuit Court of Appeals erred in finding and holding that the respondent had suffered damages measured by the difference between the proportional rates from the international boundary to the North Dakota destinations applied by the petitioner and those found reasonable by the Commission.

2. The Circuit Court of Appeals erred in finding and holding that in finding unreasonable the proportional rates from the international boundary to the North Dakota destinations the Commission, in effect, found unreasonable the through rate from the Alberta origins to the North Dakota destinations.

3. The Circuit Court of Appeals erred in entering judgment against the petitioner and in favor of the respondent.

V.

ARGUMENT.

A.

The Respondent Has Failed to Prove That He Sustained any Damages in Consequence of the Application of the Unreasonable Proportional Rate.

Section 8 of the Interstate Commerce Act provides:

> "In case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby *for the full amount of damages sustained in consequence* of any such violation of the provisions of this Act * * *." (Italics added.)

Therefore in order to recover damages from a carrier under the Act one must prove not only the violation of some provision of the Act by the carrier but also that he has suffered pecuniary damage in consequence of such violation. *Parsons v. C. & N. W. Ry. Co.*, 167 U. S. 447; *Pennsylvania R. R. Co. v. International Coal Co.*, 230 U. S. 184; *Davis v. Portland Seed Co.*, 264 U. S. 403.

It is not contended by the respondent that he made any specific proof of pecuniary loss or that the Commission made any finding that the through rate was unreasonable nor is it contended that the through rate was in fact unreasonable. The respondent contends and the Circuit Court of Appeals has held that a finding by the Commission that one factor of the through rate was unreasonable is sufficient to support an award of

damages measured by the difference between such unreasonable factor and the factor found to be reasonable, citing in support of this holding the case of *Louisville & Nashville R. R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217.

In that case the shipper attacked the through rate from the point of origin to the destination and the Commission found it to have been unreasonable in violation of Section 1 of the Act. The Supreme Court held that the damages sustained were measured by the amount of the excess exacted. The question decided in that case was quite a different one from that before us here. It is self-evident, of course, that if the total freight charges exacted from a shipper for the transportation of goods from a point of origin to destination were unreasonable the shipper would sustain damages measured by the amount of the excess exacted. His injury would be the direct result of and would be in direct proportion to the excess exacted. If the excess were great his injury would be great; if the excess were slight his injury would be slight.

But it does not follow from this that if the total freight charges exacted for the transportation of goods from a point of origin to destination were *not* unreasonable the shipper would nevertheless sustain damages if one of the factors used to compute the through rate were unreasonable nor that such damages should be measured by the amount of the excess of such factor over a reasonable factor. The factors that make up a through rate of this kind merely represent the division of such through rate among the participating carriers. *Morrell & Co. v. N. Y. C. R. R.*, 104 I. C. C. 104, 128. But the division of a rate among the participating carriers is a matter that in no way concerns the shipper. For one reason or another one carrier may take less and another may take more than what would seem to be a reasonable proportion of the through rate. But a shipper is

not injured because one carrier may receive more than a reasonable proportion of the through rate. His only interest is that the rate be reasonable as a whole. It may be unreasonable although each of the factors of which it is constructed is reasonable. It may be reasonable although some of the factors are unreasonable. *Louisville & Nashville R. R. v. Sloss-Sheffield Co., supra.*

The Commission has recognized this principle and applied it consistently to cases where the entire transportation is within the United States. In *Stevens Grocer Co. v. St. L. I. M. & S. Ry. Co.*, 42 I. C. C. 396, 398, the Commission said:

> "When the through rate or charge is made up of separately established rates or charges, applicable to the through business, the through rate or charge must be attacked as violative of the act, although the violation may be believed to be occasioned by a particular factor or factors thereof; in such case the complainant should be prepared at the hearing to prove the unlawfulness of the through rate itself and that this is due to a particular factor or factors."

In *Cairo Board of Trade v. C. C. C. & St. L. Ry. Co.*, 46 I. C. C. 343, the Commission modified its decision in the Stevens Grocer Co. case to the extent of holding that the Commission might find that a proportional rate was unreasonable in a case where the through rate was not attacked but it laid down the rule that in determining whether a shipper had been damaged the Commission must consider the total through charges, saying on page 350:

> "The rule is stated in the *Stevens Grocer Co. Case* more broadly than it should be. In determining whether or not a complainant has been damaged by the exaction of unreasonable or unduly preferential reshipping (proportional) rates the total through charges paid from point of origin must be considered."

Again in the same case it is said, page 351:

> "An excessive reshipping (proportional) rate might produce a reasonable through charge in connection with an unduly low inbound rate and vice versa."

In *Atlantic Terra Cotta Co. v. A. & W. P. Ry. Co.*, 151 I. C. C. 45, the Commission said on page 52:

> "In *Cairo Board of Trade v. C. C. C. & St. L. Ry. Co.*, 46 I. C. C. 343, 350, we announced a principle, which has since been consistently followed, that where a through rate is made up of separately established components we may pass upon the lawfulness of any one of the components independent of the others for the future, but where the matter of reparation on past shipments is concerned the total through charges must be considered."

The Supreme Court has recognized this principle in a footnote on page 283 of *U. S. v. Abilene & Southern Ry. Co.*, 265 U. S. 274, where in discussing the parties necessary to a division case the court said:

> "The case is wholly unlike those in which it is held that where a shipper attacks a through rate all participating carriers must be made respondents, even though the through rate is made up of separately established elements. The complainant may wish to direct his attack only against one of these. But it is only the through rate which is in issue. It may be reasonable although one of its elements is not. It must stand or fall as an entirety. See *Stevens Grocer Co. v. St. Louis, Iron Mountain & Southern Ry. Co.*, 42 I. C. C. 396, 398; *McDaritt Bros. v. St. Louis, Brownsville & Mexico Ry. Co.*, 43 I. C. C. 695; *LaCrosse Shippers' Assoc. v. Chicago, Milwaukee & St. Paul Ry. Co.*, 43 I. C. C. 605, 607; *E. I. Dupont de Nemours Powder Co. v. Pennsylvania R. R. Co.*, 43 I. C. C. 227. Compare *Star Grain & Lumber Co. v. Atchison, T. & S. F. Ry. Co.*, 14 I. C. C. 364, 371; *Indianapolis Chamber of Commerce v. Cleveland, Cincinnati, Chicago & St.*

Louis Ry. Co., 46 I. C. C. 547, 556; *Johnson & Son v. St. Louis-San Francisco Ry. Co.*, 51 I. C. C. 518, 520."

While the precise question here under consideration has never been decided by the Supreme Court it is our opinion that that court recognized the principle laid down by the Commission in the *Cairo Board of Trade case*, *supra*, and for which we are contending here and applied it to international shipments in *News Syndicate Co. v. N. Y. C. R. R.*, 275 U. S. 179. In that case numerous carload shipments of newsprint paper had been made from Thorold, Ontario, to New York City at a joint through rate from the point of origin to destination which the Commission found was unreasonable. The carriers participating in that part of the transportation within the United States did not publish a rate on this commodity from the international boundary to New York City. The Commission awarded reparation measured by the difference between the charges exacted for the through transportation and those that would have accrued at the rates found reasonable by the Commission. In a suit brought in the District Court to enforce that award the District Court sustained a demurrer to the complaint on the ground that it failed to state a cause of action, holding that the Commission's order was void for want of jurisdiction because it dealt solely with charges for transportation from a point in Canada to a point in the United States. Upon appeal to the Circuit Court of Appeals that court certified certain questions to the Supreme Court, among them being the following:

> "1. Where a railroad of the United States and a railroad of the Dominion of Canada unite in the publication of a joint through rate from a point within the Dominion of Canada to a point within the United States, the rate covering transportation both in Canada and in the United

States, has the Interstate Commerce Commission of the United States jurisdiction, on complaint of a shipper or consignee made against the United States railroad alone, to determine the reasonableness of such joint through rate?"

The answer was "Yes, for the ascertainment of damages".

In discussing this question the court said:

"As to question 1.—The Interstate Commerce Act applies to the lines that carried, and to the transportation of, the paper from the international boundary to New York City. Secs. 1 (1) and (2). It was the duty of defendants in error to establish just and reasonable rates for that service. Secs. 1 (5), Sec. 4 (1) and 7. They failed to make or publish any rate applicable to that part of the transportation. Section 8 makes them liable for damages sustained *in consequence of such failure. Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error.* Its right to reparation does not depend upon the amounts retained by defenants in error pursuant to agreed divisions. *Louisville & Nashville R. R. v. Sloss-Sheffield Co.*, 269 U. S. 217, 231. Their breach of the statutory duty was a proximate cause of the losses complained of. The failure to establish rates covering the transportation from the international boundary contravened the provisions of the Act and compelled plaintiff in error to pay the through charges complained of. The Commission had jurisdiction to determine whether plaintiff in error was entitled to an 'award of damages under the provisions of this Act for a violation thereof.' Sec. 16 (1). And it was the duty of the Commission to ascertain the damages sustained. It is obvious that, in the ascertainment of damages, the Commission had jurisdiction to determine the reasonableness of the charges exacted." (Italics added.)

The analogy between that case and the case at bar is very close. Both involved shipments from points in Canada to

points in the United States. In both cases it was the duty of the American carriers to establish just and reasonable rates from the international boundary to the American destination. In both cases the American carriers failed in that duty. In the *News Syndicate case* no rate at all was published; in the case at bar an unreasonable rate. In both cases Section 8 of the Interstate Commerce Act made the American carriers "liable for damages sustained in consequence of such failure." How should those damages be measured? In the *News Syndicate case* the Supreme Court said: "Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error." The measure of damages, therefore, was the extent to which the through rate was unreasonable. Should the analogy between these cases stop here? Is there any reason why the measure of damages which the Supreme Court laid down in the *News Syndicate case* should not apply to the case at bar? We can think of none. The only difference between the facts of the two cases is that in the *News Syndicate case* no rate at all was published from the boundary whereas in this case an unreasonable rate was published. Is this difference sufficient to justify a different measure of damages? The decision in the *News Syndicate case* indicates that the Supreme Court did not measure the damages by the through rate because no rate had been published from the boundary but because that was the proper measure of damages. "Had the through rate been just and reasonable, no damage would have resulted to plaintiff in error". We submit that the same principle should be applied to the case at bar. If the through rate in this case was just and reasonable no damages resulted to the respondent.

As previously stated the Commission in this case made no finding with respect to the reasonableness of the through rate

but awarded damages measured by the difference between the factor from the international boundary to destination and what it found to be a reasonable factor between such points. Since the Commission used an improper measure of damages in this case and failed to find the facts essential to the application of a proper measure of damages and since such a finding can only be made by the Commission, the respondent has failed to prove that he sustained any damages in consequence of the petitioner's failure to publish a reasonable proportional rate from the international boundary to destination.

B.

The Decision of the Circuit Court of Appeals was in Error.

The Circuit Court of Appeals held that the proportional rate from the boundary was applicable only as a part of the through rate and as such the Commission found it unjust and unreasonable; that it must be assumed that the Commission considered the rate in question as a part of the through rate; that the petitioner committed a tort because it collected the unjust and unreasonable proportional rate; and that plaintiff's damages are measured by the difference between the unjust and unreasonable proportional rate and the maximum rate found reasonable by the Commission (Rec. 45...).

The arguments submitted by the petitioner as to why the measure of damages used by the Commission was improper, which were substantially those submitted herein, were not discussed or answered in any way except in the ultimate conclusion that such measure of damages was correct. It is true that the Circuit Court of Appeals cited as authority for this conclusion the decision of the Supreme Court in *Louisville & Nashville R. R. v. Sloss-Sheffield Co., supra.* But we have

already pointed out wherein that decision is not applicable here. In that case the Commission found the through rate *unreasonable* and the Supreme Court held such a finding sufficient to support an award of damages. Here the Commission made no such finding but found only that one factor of the through rate was unreasonable and we contend that such a finding is not sufficient to support an award of damages. It is not a sufficient answer to our contention to point to the decision holding that a finding that the through rate was unreasonable is sufficient. That, we believe, is equivalent to answering a contention that the facts do not bring a case within a rule by pointing to the rule or meeting a contention that the evidence did not justify a verdict by pointing to the verdict.

We do not understand what connection there is between the ultimate conclusion of the Circuit Court of Appeals and its statement that it must be assumed that the Commission considered the proportional rate in question as a part of the through rate. Of course the Commission is aware that every proportional rate is by its very nature a part of a through rate and cannot be used except as a part of a through rate. We have contended that at least so far as damages are concerned a proportional rate should not be considered apart from the through rate and that a shipper is interested only in the reasonableness of the through rate. The Circuit Court of Appeals seems to admit the force of this argument and to recognize that the proportional rate must be considered as a part of the through rate.

But if the Circuit Court of Appeals meant to imply that the Commission in considering the proportional rate as a part of the through rate and in determining that it was unreasonable, thereby, in effect, found that the through rate was unreasonable to the same extent and in the same amount as the propor-

tional rate, we submit that there was no justification for such a conclusion. As the Supreme Court said in *Keogh v. C. & N. W. Ry.,* 260 U. S. 156, 165, damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture. If the Commission had intended to find that the through rate was unreasonable to the same extent as the proportional rate it would have said so in plain terms and not left it to conjecture. That it was not the intent of the Commission to make such a finding is made clear from the dissenting of Commissioner Brainerd, concurred in by Commissioner Woodlock, (Rec. 34) in which attention is called to the fact that only the proportional rate is found unreasonable, and that fact is made the basis of the dissent. It cannot be doubted that the Commission, with a clear realization of what it was doing, based its award of damages solely on the finding that the proportional rate was unreasonable and without giving any consideration whatever to the reasonableness of the through rate, under the belief that respondent's damages might properly be measured by the extent to which such proportional rate was unreasonable and regardless of the fact that the through rate may have been reasonable.

There was no finding by the Commission that the through rate was unjust and unreasonable and consequently there could be no evidence from which the District Court could find that rate was unjust and unreasonable. In the absence of evidence the law will presume that men acted lawfully rather than unlawfully. Therefore the law will presume that the through rate collected in this case was just and reasonable rather than unjust and unreasonable. That being true the only question is whether or not under these facts the respondent is entitled to damages by way of reparation. We submit that he is not.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the errors committed by the Circuit Court of Appeals may be corrected, and that to such end a writ of certiorari should be granted by this Court and this Court should review the decision of the Circuit Court of Appeals and finally reverse it.

Respectfully submitted,

R. J. HAGMAN,
J. P. PLUNKETT,
Counsel for Petitioner.